# John Trawe Kuda v Adtec Sdn Bhd

HIGH COURT (MIRI) — SUIT NO MR 40 OF 1994
RICHARD MALANJUM J
18 SEPTEMBER 1995

***Civil Procedure*** *— Appeal — Amendment of pleadings on appeal — Whether amendments would cause injury or prejudice*

***Civil Procedure*** *— Appeal — Adducing fresh evidence — Principles applicable — Whether appeal from registrar to judge in chambers dealt with by way of actual rehearing — Whether affidavits admissible — Rules of the High Court 1980 O 56 r 3A*

On 3 September 1994, the appellant/plaintiff filed a legal action against the respondent/defendant in relation to a plane crash in Miri, Sarawak on 3 September 1991. By way of summons in chambers dated 2 March 1995, the respondent/defendant applied to strike out the action on the ground of limitation. On 24 May 1995, the action was struck out. The appellant/plaintiff appealed against the decision of the senior assistant registrar ('the SAR') and hearing of the appeal was fixed for 30 August 1995. Before proceeding to deal with the appeal, learned counsel for the appellant/plaintiff submitted that the applications to amend the reply and to admit fresh evidence should be heard first. The respondent/defendant objected to the applications contending inter alia, that (1) there was no reply to be amended as the action had been struck out and the decision was yet to be reversed; and (2) O 56 r 3A of the Rules of the High Court 1980 ('the RHC 1980') had not been satisfied in respect of the alleged new evidence. Learned counsel for the respondent/defendant also argued that the appellant/plaintiff failed to show any reasonable diligence in attempting to secure the alleged fresh evidence before the hearing of the application of the respondent/defendant on 24 May 1995.

**Held**, allowing both applications:

(1) It is settled that amendments may be allowed at any stage of the proceedings, even on appeal if it will not do the opponent party some injury or prejudice him in some ways that cannot be compensated for by costs or otherwise. Since there was no injury or prejudice that might be suffered by the respondent/defendant which could not be compensated by costs, there was therefore no reason to refuse leave to the application by the appellant/plaintiff to amend the reply (see pp 339I–340B); *Chen Chow Lek v Tan Yew Lai* [1983] 1 MLJ 170 followed.

(2) An appeal from the registrar to a judge in chambers is dealt with by way of actual rehearing. Parties are at liberty to file further affidavits for consideration and the judge is bound to consider all affidavits filed before the hearing of the appeal (see pp 341D–

342B); *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97, *Chiew Soon @ Chiew Chun Soon v Tay Tai Aun* [1990] 1 CLJ 469, *Amanah Factors Sdn Bhd v Trans Resources Corporation Sdn Bhd & Ors* [1992] *Mallal's Digest* para 267 and *Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia* [1995] 2 MLJ 194 followed.

(3) Order 56 r 3A of the RHC which was inserted vide PU (A) 192/93 has not changed the nature of the hearing in an appeal to a judge in chambers. That should necessarily mean that the parties are at liberty to file further affidavits for consideration. However, if new evidence is involved then r 3A should be adhered to. In the present case, the requirements of r 3A have been fulfilled (see p 342C–F).

(4) In relation to admitting fresh evidence, there was no basis to say that there was lack of reasonable diligence on the part of the appellant/plaintiff to obtain such evidence and to submit it before the SAR during the hearing of the application of the respondent/defendant. Furthermore the respondent/defendant did not rebut the state of knowledge of the appellant/plaintiff as averred in his affidavit (see p 343B–C).

**[Bahasa Malaysia summary**

Pada 3 September 1994, perayu/plaintif telah memfailkan satu tindakan undang-undang terhadap penentang/defendan berkenaan dengan satu nahas kapal terbang di Miri, Sarawak yang berlaku pada 3 September 1991. Melalui saman dalam kamar bertarikh 2 Mac 1995, penentang/defendan telah memohon untuk membatalkan tindakan tersebut atas alasan had masa. Pada 24 Mei 1995, tindakan tersebut telah dibatalkan. Perayu/plaintif telah merayu terhadap keputusan penolong kanan pendaftar ('PKP') dan pembicaraan rayuan tersebut telah ditetapkan pada 30 Ogos 1995. Sebelum meneruskan rayuan itu, pecuambela perayu/plaintif telah menghujahkan bahawa permohonan untuk menerima pindaan-pindaan kepada jawapan dan untuk menerima keterangan baru harus dibicarakan dahulu. Penentang/defendan telah menentang permohonan-permohonan dengan menghujahkan, antara lainnya, bahawa (1) tidak terdapat sebarang jawapan untuk dipinda kerana tindakan tersebut telah dibatalkan dan keputusan itu belum diakaskan lagi; dan (2) Aturan 56 k 3A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980') tidak dipatuhi berkenaan dengan keterangan baru yang dikatakan. Peguambela penentang/defendan juga telah menghujahkan bahawa perayu/plaintif telah gagal menunjukkan bahawa usaha yang munasabah telah dilakukan untuk memperolehi keterangan baru itu sebelum pembicaraan permohonan penentang/defendan pada 24 Mei 1995.

**Diputuskan**, membenarkan kedua-dua permohonan itu:

(1) Adalah undang-undang mantap bahawa pindaan boleh dibenarkan pada mana-mana peringkat di dalam prosiding itu, meskipun

pada peringkat rayuan jikalau ianya tidak memudaratkan pihak penentang dalam cara-cara yang tidak dapat dipampaskan dengan kos atau sebaliknya. Oleh kerana tidak terdapat kerugian ataupun kemudaratan yang dialami oleh penentang/defendan yang tidak dapat dipampaskan dengan kos, maka tidak ada sebab untuk mahkamah enggan memberi kebenaran kepada permohonan perayu/plaintif untuk meminda jawapannya (lihat ms 339I–340B); *Chen Chow Lek v Tan Yew Lai* [1983] 1 MLJ 170 diikut.

(2) Satu rayuan daripada pendaftar kepada hakim dalam kamar adalah diuruskan sebagai satu perbicaraan semula. Pihak-pihak mempunyai kebebasan untuk memfailkan afidavit-afidavit tambahan untuk dipertimbangkan dan hakim wajib mempertimbangkan kesemua afidavit-afidavit yang telah difailkan sebelum pembicaraan rayuan itu (lihat ms 341D–342B); *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97, *Chiew Soon @ Chiew Chun Soon v Tay Tai Aun* [1990] 1 CLJ 469, *Amanah Factors Sdn Bhd v Trans Resources Corporation Sdn Bhd & Ors* [1992] *Mallal's Digest* perenggan 267 dan *Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia* [1995] 2 MLJ 194 diikut.

(3) Aturan 56 k 3A KMT 1980 yang telah dimasukkan melalui PU (A) 192/93 tidak mengubah keadaan pembicaraan dalam satu rayuan ke hakim dalam kamar. Ini sememangnya bermakna bahawa pihak-pihak mempunyai kebebasan untuk memfailkan afidavit-afidavit tambahan untuk dipertimbangkan. Akan tetapi, jika terdapat penglibatan keterangan yang baru maka k 3A harus diikut. Di dalam kes sekarang ini, kehendak k 3A telah pun dipenuhi (lihat ms 342C–F).

(4) Berkenaan dengan penerimaan keterangan baru, tidak ada alasan untuk menyatakan bahawa terdapat kekurangan usaha yang munasabah oleh perayu/plaintif untuk memperolehi keterangan sedemikian dan untuk mengemukakannya di hadapan PKP semasa pembicaraan permohonan penentang/defendan. Lagipun penentang/defendan tidak mematahkan keadaan pengetahuan perayu/plaintif seperti yang dinyatakan dalam afidavitnya (lihat ms 343B–C).]

**Notes**

For cases on adducing fresh evidence, see 2 *Mallal's Digest* (4th Ed 1994 Reissue) paras 259–269.

For a case on admissibility of affidavits, see 2 *Mallal's Digest* (4th Ed 1994 Reissue) para 270.

For a case on amendment of pleadings on appeal, see 2 *Mallal's Digest* (4th Ed 1994 Reissue) para 272.

**Cases referred to**

*Amanah Factors Sdn Bhd v Trans Resources Corporation Sdn Bhd & Ors* [1992] *Mallal's Digest* para 267
*Chen Chow Lek v Tan Yew Lai* [1983] 1 MLJ 170
*Chiew Soon @ Chiew Chun Soon v Tay Tai Aun* [1990] 1 CLJ 469
*Ladd v Marshall* [1954] 3 All ER 745
*Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia* [1995] 2 MLJ 185
*Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97
*Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229

**Legislation referred to**

Rules of the High Court 1980 O 56 r 3A

*Raymond Szetu* and *Antalai Sawing* (*Antalai, Trang & Co*) for the appellant .
*Perpetua Phang* (*Reddi & Co*) for the respondent.

**Richard Malanjum J**:

BACKGROUND FACTS

On 3 September 1991 a plane, a skyvan model, crashed in Kuala Layun, Long Seridan, Baram, Miri, Sarawak with 18 passengers and two crew personnel on board. As a result of the crash, 14 of the passengers perished. An inquest was conducted but no legal action was filed until 3 September 1994. By way of a summons in chambers dated 2 March 1995, the respondent/defendant applied to strike out the action on the ground of limitation. The application was served on 15 March 1995 with the hearing scheduled on 21 April 1995. However, that hearing was adjourned to 24 May 1995 on the application of learned counsel for the appellant/plaintiff to enable him to file an affidavit in opposition. That was done and served on the respondent/defendant on 22 May 1995. Hearing of the application proceeded on 24 May 1995 and the senior assistant registrar ('the SAR') gave his decision on the same day allowing the application of the respondent/defendant and striking out the action of the appellant/plaintiff.

There is now an appeal to this court against that decision. The hearing was fixed on 30 August 1995, but before proceeding to deal with the appeal, learned counsel for the appellant/plaintiff submitted that the applications to amend the reply and to admit fresh evidence should be heard first. That was done and the ruling was accordingly given on 30 August 1995.

In delivering my ruling I stated that in the event of an appeal I would give my grounds before the hearing proper of the appeal. As the respondent/

A defendant has indicated its intention to appeal against the ruling, these are therefore my grounds of decision.

THE APPLICATIONS

By way of a summons in chambers dated 16 August 1995 (encl 29) the B appellant/plaintiff applied for leave as follows (verbatim):

> 1 Admit the affidavits of John Trawe Kuda and Datuk Robert Jacob Ridu affirmed on 14 August 1995 during the hearing of the appeal to the judge in chambers against the decision of the senior assistant registrar given on 24 May 1995, copies of which have been filed in court.
>
> C 2 Amend the plaintiff's reply, a copy of the amended reply is attached herein and marked 'A'.

THE CONTENTIONS OF THE RESPECTIVE PARTIES AND FINDINGS

For convenience I hereby summarize the submissions of learned counsel for the respective parties for each of the applications in the order they were D made before me.

*For leave to amend the reply*

For the appellant/plaintiff, learned counsel submitted that leave should be granted on the grounds that:

E (a) new issues were involved;

(b) an appeal from the SAR should be considered a continuous process; and

(c) amendment can be done at any stage of the proceeding, including an appeal stage, so long as the opposite side does not suffer any prejudice F which cannot be compensated in terms of costs.

In objecting to the application, learned counsel for the respondent/defendant argued that the application should be refused since there was no reply to be amended, the action having been struck out by the SAR earlier on and which is yet to be reversed. Further, learned counsel stated that for the G application to succeed there must be good and strong ground. The case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 was cited where his Lordship Lee Hun Hoe (CJ Borneo) in delivering his short judgment in the Federal Court said this, at p 230G (left):

> This court will only permit amendment on very good and strong justification. H Leave to amend was refused.

Apart from that submission, learned counsel for the respondent/defendant did not indicate any injury or prejudice to the respondent/defendant which could not be compensated in terms of costs if the application to amend was allowed.

I Now, it is settled that amendments may be allowed 'at any stage of the proceedings', even on appeal 'if it will not do the opponent party some injury or prejudice him in some ways that cannot be compensated for by costs or otherwise'; see *The Supreme Court Practice* Vol 1 1991 p 368.

But learned counsel for the respondent/defendant said that there was nothing to amend as the action had been struck out. With respect, I do not think such a simplistic approach can be entertained. In the case of *Chen Chow Lek v Tan Yew Lai* [1983] 1 MLJ 170, the High Court dismissed the action of the appellant with costs. On appeal to the Federal Court, the appellant sought to amend his statement of claim. That was allowed and his Lordship Salleh Abas FJ (as he then was) said this at p 172I (right):

> We allowed the motion because we think that it is fair that we should do so as the proposed amendment is fully covered by evidence in the records and not in any way prejudicial to the respondent.

No doubt in that case the proposed amendment was covered by the evidence adduced. But such a situation could not arise in the instant case as there was no trial. Nevertheless, the more relevant point is the fact that the action was dismissed by the High Court and if going by the contention of learned counsel in the present case, such an application to amend should not have been allowed. But it was allowed thereby rendering such a contention to be without merit. I had therefore no reason to refuse leave to the application to amend by the appellant/plaintiff. Moreover, I found no injury or prejudice that might be suffered by the respondent/defendant which could not be compensated for by costs. Leave to amend the reply as proposed was therefore granted.

*Leave to admit at the hearing of the appeal the affidavit of the appellant/plaintiff — John Trawe Kuda sworn on 14 August 1995 and the affidavit of Datuk Robert Jacob Ridu also sworn on 14 August 1995*

Both the above affidavits were annexed as 'A' and 'B' respectively to the affidavit of the appellant/plaintiff sworn on 15 August 1995 and filed in support for the application for leave.

For the appellant/plaintiff it was submitted that these affidavits should be admitted at the hearing of the appeal for the following reasons, in summary:

(a) that new issues are involved which were not before the SAR namely, admission of liability by the respondent/defendant and fraudulent concealment of evidence;

(b) that on appeal to a judge in chambers, the judge is to treat matters as though coming up for the first time;

(c) that in practice new issues on appeal should be allowed although to be most jealously scrutinized;

(d) that the new issues were existing at the time of the hearing before the SAR but were not within the reach of the appellant/plaintiff;

(e) that O 56 r 3A of the Rules of the High Court ('the RHC 1980') and the principle in *Ladd v Marshall* [1954] 3 All ER 745 are not applicable in the present case;

(f) alternatively, that the conditions under O 56 r 3A of the RHC 1980 and the principle in *Ladd v Marshall* have been satisfied; and

A (g) that legal technicalities or mistake should not be allowed to frustrate any just claim.

In objecting to the application, learned counsel for the respondent/defendant contended that the application should be dismissed in that O 56 r 3A of the RHC 1980 had not been satisfied in respect of the alleged admission B and the fraudulent concealment of evidence. Learned counsel argued that the appellant/plaintiff failed to show any reasonable diligence in attempting to secure the evidence of the alleged admission before the hearing of the application of the respondent/defendant. It was further submitted that such alleged admission would not have had any determining influence on C the decision of the SAR.

Similar arguments were marshalled in respect of the allegation on fraudulent concealment of evidence. It was also added that the respondent/defendant could not have concealed evidence which it did not have at the material time.

D I will deal first with the nature of the hearing in an appeal to a judge in chambers from a decision of a registrar which includes a senior assistant registrar.

To begin with, the comment of his Lordship Edgar Joseph Jr SCJ (now FCJ) in *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 appears to be relevant. At p 106, his Lordship said E this:

> Two things are plain from the above passage in the judgment of Lord Atkin (in *Evans v Bartlam* [1937] AC 473, [1937] 2 All ER 646), namely:
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> (1) in an appeal from a discretionary order of the master (equivalent here to a senior assistant registrar) to a judge in chambers, the judge exercises F his own discretion as though the matter comes before him for the first time, unfettered by the previous exercise of the master's discretion; and
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> (2) so far as the master's decision is concerned, the judge will give it the weight it deserves.

In *Chiew Soon @ Chiew Chun Soon v Tay Tai Aun* [1990] 1 CLJ 469 at G 409I (left) his Lordship Zakaria Yatim J (as he then was) said this:

> On 16 November 1988, I ruled that the two affidavits were admissible for the purpose of the appeal. My ruling was based on two grounds. Firstly, an appeal from the registrar to a judge in chambers is dealt with by way of an actual rehearing. The judge hearing the appeal treats the matter as though H it is coming up for the first time. Secondly, it is common practice for the judge in chambers, subject to costs, to admit further or additional evidence by affidavit: *The Standard Chartered Bank v Kentland Sdn Bhd & Anor* [1989] 1 CLJ 1126.

Similar views were also expressed by his Lordship Abdul Malek J in I *Amanah Factors Sdn Bhd v Trans Resources Corp Sdn Bhd & Ors* [1992] *Mallal's Digest* para 267, when he said that an appeal against a decision of a senior assistant registrar 'comes by way of rehearing before the judge, it follows that parties are at liberty to file further affidavits for consideration,

and the judge is bound to consider all affidavits filed before the hearing of the appeal'. A

And in *Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia* [1995] 2 MLJ 185, his Lordship Visu Sinnadurai J following the case of *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 also observed that an appeal against a decision of a senior assistant registrar is by way of an actual rehearing and that the judge is in a 'position to exercise an independent discretion' of his own to consider the issue before him. B

Now, I am aware that O 56 r 3A of the RHC 1980 was inserted vide PU (A) 192/93. But I do not think it has changed the nature of the hearing in an appeal to a judge in chambers as described in the above mentioned cases. And that should necessarily mean that the parties are 'at liberty to file further affidavits for consideration'. Yet if new evidence is involved then r 3A should be adhered to. C

In the present case it is common ground that the two affidavits sought to be admitted at the hearing of the appeal contain matters which were not canvassed before the SAR. Hence, r 3A should be applicable. D

Order 56 r 3A of the RHC 1980 reads:

> At the hearing of the appeal, fresh evidence shall not be admitted unless the judge is satisfied that: E
>
> (a) at the hearing before the registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the registrar.

This rule incorporated the pronouncement of Lord Denning MR in *Ladd v Marshall* [1954] 3 All ER 745 at p 748: F

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible. G

As indicated hereinabove, the two affidavits which the appellant/plaintiff is seeking to introduce contain two matters, namely, the alleged admission of the respondent/defendant in the form of letters and the fraudulent concealment of evidence related to the record of proceeding of the inquest. They were not submitted before the SAR during the hearing of the application of the respondent/defendant. H

Having heard the respective submissions of learned counsel for the parties and having read the relevant affidavits, I was satisfied that the requirements of r 3A were fulfilled. I therefore granted leave as prayed for. I

A In respect of the alleged admission, the appellant/plaintiff was frank and honest to disclose that he did attempt to call Datuk Robert Jacob Ridu. But it was not obvious at that point in time that indeed such evidence was existing and available. I was inclined to agree with learned counsel for the appellant/plaintiff that the attempt to contact Datuk Robert Jacob Ridu was only to cover all the possibilities. Surely that should not be B taken as the basis to say that there was lack of reasonable diligence to obtain such evidence. After all, the respondent/defendant did not rebut the state of knowledge of the appellant/plaintiff as averred in para 12 of his affidavit sworn on 15 August 1995 (encl 29). That therefore settled the first requirement.

C As regards the second requirement it would be over-presumptuous to say that such evidence would not have had any determining influence upon the decision of the SAR even if it had been presented to him. In my view it could have involved the computation of the limitation period. Anyway, such an issue including the implications to be attributed to the D documents and the argument that the alleged admission did not come from the respondent/defendant should be heard during the hearing proper of the appeal. I also noted that there was no challenge on the authenticity of the letters connected to the alleged admission or their apparent credibility.

With regard to the averment of fraudulent concealment of evidence, it was not in dispute that the inquest hearing was only completed on 25 E May 1995, a day after the hearing before the SAR and the record of the proceeding of the inquest was only available at the end of July 1995. Surely such a fact should satisfy the first requirement of r 3A.

Learned counsel for the respondent/defendant submitted that the evidence was already available before the hearing of 24 May 1995 as F counsel for the appellant/plaintiff was present during the inquest. That may be true. But the appellant/plaintiff should also be entitled to wait for the official record of the proceeding of the inquest in order to consider the matter as a whole before making any conclusion. And that should be so in this case as there was no rebuttal to the submission that the counsel for the G appellant/plaintiff was not present in the earlier part of the proceeding of the inquest where the employees of the respondent/defendant gave their version as to the cause of the crash.

As for the second requirement of r 3A in relation to the second fresh evidence, again I must say that if it was before the SAR, then the computation of the limitation period could have been affected provided it H was given due consideration. Learned counsel for the respondent/defendant argued that her client should not be blamed for any concealment as it did not have such evidence at the material time. That argument should be heard at the hearing proper of the appeal. To consider it at this stage would tantamount to considering the merits of the appeal and that would be premature. And as to whether the fresh evidence is credible I do not I think that was in dispute between the parties. After all the matter involves the official record of proceeding of the inquest.

I did also consider the other arguments of learned counsel for the respondent/defendant before coming to my decision. I did not find them convincing either because they were trivial or not relevant in determining the application.

In addition to the foregoing reasons, I would say that there could have been an obvious inconsistency if this second application of the appellant/plaintiff was refused after allowing the first one, ie leave to amend the reply. After all the proposed amendments also dealt with the same matters.

CONCLUSION

Accordingly, for the above reasons, I granted both the applications of the appellant/plaintiff and fixed the hearing of the appeal on 27 October 1995 at 10 am.

*Application allowed.*

Reported by Ng Kian Pin